No. 10-357

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

PATSY MAHARAM,

Petitioner,

—v.—

JAMES PATTERSON, MICHAEL GARLAND, SAKS & CO., INC., LINN TANZMAN, LITTLE, BROWN, TIME WARNER INC. and its subsidiaries, TIME, INC., TIME WARNER BOOK GROUP, INC. and HACHETTE BOOK GROUP USA, INC.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

The *independent creation* of an artistic work is originated deep in the mind of the artist. For this reason, can the affirmative defense of *independent creation* ever be a factor for summary judgment?

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of the United States Supreme Court, Respondents Little, Brown & Co., Time Warner Inc., Time Inc., Time Warner Book Group, and Saks Incorporated state as follows:

Hachette Book Group Inc. is the successor in interest to Little Brown & Co. and Time Warner Book Group Inc. Hachette Book Group Inc. is a wholly owned subsidiary of Hachette Livre USA, Inc., which is a wholly owned subsidiary of Lagardere North America, Inc., which is a wholly owned subsidiary of Hachette SA, which is a wholly owned subsidiary of Lagardere SCA. Lagardere SCA is publicly traded in France.

Time Inc. is a wholly owned subsidiary of Time Warner Inc. Time Warner Inc. is a publicly held corporation, has no parent corporation, and no other corporation owns more than 10% of its stock.

Saks Incorporated has no parent corporation, and no publicly held corporation owns more than 10% of its stock.

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents respectfully submit this brief in opposition to the Petition for Writ of Certiorari.

STATEMENT OF THE CASE

Petitioner seeks a Writ of Certiorari following affirmance by the Second Circuit of an order from the District Court of the Southern District of New York granting defendants summary judgment and dismissing Petitioner's claims of copyright infringement in the face of overwhelming evidence of defendants' independent creation of their work. *Maharam v. Patterson*, No. 04 CV 9569KMW, 2007 WL 2702195 (S.D.N.Y. Sept. 17, 2007), *aff'd,* 369 Fed. Appx. 240 (2d Cir. Mar. 11, 2010). Petitioner submits that independent creation may never be a ground – indeed never a "factor" – for summary judgment in a copyright infringement case because artistic creation "originate[s] deep in the mind of the artist." But courts in circuits across the United States routinely consider evidence of independent creation on summary judgment and when, as here, the evidence is overwhelming and unrebutted, will hold that the plaintiff has failed to raise a material issue of fact and grant the motion on that ground. Indeed this Court has declined to grant certiorari on this very issue before.

Rather than raising any issue for this Court, this case involves an all-too-common set of facts in the

publishing world: two works created two decades apart, whose similarities derive from their shared subject matter; a showing of access based on nothing but speculation and the extremely limited distribution of plaintiff's work; and a wealth of documentary evidence and witness testimony showing that the defendants conceived, developed, and executed their work completely independently from plaintiff's. In fact, the only remarkable aspect to this case is the extraordinary strength of that evidence of independent creation. In short, there is no basis for the grant of certiorari and the Petition should be denied.

James Patterson, one of the most experienced and popular authors of his generation, first conceived of his children's book *santaKid* in 2002. Intended from the beginning as a book about the commercialization of Christmas, the first handwritten draft featured Santa's son, Jack, inspired by Patterson's own young son of the same name. Over the course of a further ten drafts of the text, and documented by editorial comment letters and hand-edited versions of the work in progress, the plot developed, scenes were written and dropped, and the protagonist changed to a girl, Christy and finally Chrissie.

As published in November 2004, the book tells the story of how Christmas and Chrissie's life at the North Pole were almost ruined when Christmas was bought by a large corporation, Exmas Express, who under the baleful influence of its ruthless owner, Ransom, applied production line techniques to produce tasteless and shoddy toys. Chrissie's appeal

to Ransom that Christmas was losing its magic fell on deaf ears, but when on Christmas Eve the Exmas Express trucks sent to deliver the presents stuck in the snow, Chrissie turned to her father Santa to save the day. Sadly Santa had become discouraged and put on weight during his enforced idleness so he could no longer fly the sleigh. With the help of the elves, Chrissie took the reins and, propelled by the force of her belief in Christmas, delivered all the presents herself. Ransom, now a reformed man, agreed to return Christmas to Santa's care. Chrissie appears in the book conservatively dressed in duffle coat, red hat, scarf, boots and mittens. In 2004, Saks Fifth Avenue in New York devoted its Christmas windows to six scenes from Patterson's *santaKid*.

Some twenty years earlier, around 1982, Petitioner Patsy Maharam composed her song *"Kid" Santa Claus* about Santa's daughter who flies through the sky delivering toys. She recorded the song and released it on her private label Roperry the following year. Around the same time, Maharam also created a short *"Kid" Santa Claus* illustrated storybook and in the following few years created a handful of related works on the same theme. In the 1982 storybook, Maharam tells the story of Santa's daughter, Holly, who receives a call from her father to tell her that he is stranded by fog in Hollywood where he had gone to receive a star on the Walk of Fame. Holly decides to deliver the presents herself, aided by her brother Christopher and an igloo-shaped robot called Iglue. The bulk of the seventeen page book describes Holly's journey to Europe, New York, Miami and Atlanta, and when she gets lost Iglue sets her right. Finally she collects Santa at

Los Angeles airport and together they deliver the rest of the presents.

Most of Maharam's related works contain minimal or even conflicting story elements. For example, neither the song nor a follow-up song called *Daughter of Santa Claus* contain any plot details, whereas in the 1989 expanded storybook, Holly also visits Chicago and Montgomery and descends into the New York subway. Finally, in a related short musical play, Holly is joined by singing reindeer and dancing cowboys and indians. Consistently, however, Holly is a thoroughly modern, sassy girl, dressed trendily in a red and white sweatshirt, patched jeans, striped socks, and sneakers, her wavy red hair topped by a baseball cap.

Consistent with self-publication, Maharam's *"Kid" Santa Claus* works were not widely disseminated, and even then, primarily in the 1980s. According to Maharam, the initial song was briefly available in record stores until the beginning of the 1990s, and some radio stations played the songs in the mid 1980s (it appeared at #92 in the Cashbox magazine top 100 chart for one week in 1984). The initial storybook was not sold to the public but was used as a promotional tool or bundled with some copies of the *"Kid" Santa Claus* record at a record store in New York City. The expanded storybook was never published at all and the only dissemination of the musical play consisted of two 1991 performances at a restaurant in Manhattan and readings at private parties, a New York hotel,

and some local schools.[1] In 1986, Maharam hired a publicist, Linn Tanzman, to publicize the *"Kid" Santa Claus* project in the press and on television but with limited success, and in none of these efforts were the plot, sequence of events or the Holly character revealed beyond the most abstract of ideas. As the district court observed, such a record of dissemination presented an argument for access that was "attenuated" at best.

Plaintiff sought a preliminary injunction and the defendants moved for judgment on the pleadings on the grounds of a lack of substantial similarity, conceding, for purposes of the motion only, that defendants had access to Maharam's works. In her decision, Judge Kimba Wood denied the preliminary injunction, finding that Maharam's access arguments were "attenuated and indirect" and insufficient to support an inference of access, and that it was "unlikely that a jury would find such striking similarity between the works as to infer access." SA-612-13. The court also denied the motion to dismiss because, even though the issue of substantial similarity here was "a close one," drawing all reasonable inferences in the plaintiff's favor, there were sufficient similarities to "raise issues of material fact, warranting submission to a jury on ... copyright infringement."[2] SA-594-95.

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[1] A two-minute animated video, also created in 1983, contains only a cursory summary of her story. SA-193-97.

[2] Maharam seizes on this language to claim that Judge Wood's later grant of summary judgment was improper because (1) the finding on the motion to dismiss was "law of the case" (*see, e.g.*,

Following extensive fact discovery, defendants moved for summary judgment. In granting the motion, Judge Wood referred to the analysis of the works in her earlier decision on the motion to dismiss but did not undertake to repeat a comparison of the works under the summary judgment standard. Instead, the court "assumes, *arguendo*, that Plaintiff has made a prima facie case of infringement" and granted summary judgment on the basis of the "vast amount of evidence" showing defendants' independent creation of *santaKid*. Summary Judgment Decision at 8a and 10a.. The court stressed in a long footnote that it was making no finding that plaintiff had *indeed* made a *prima facie* case of infringement. In fact, the court laid out Maharam's "attenuated argument that Defendant [sic] might have encountered her work because it was widely disseminated" and found that "[t]his dissemination is not as extensive as the broadcasting that has taken place in cases where courts have found a work to be widely disseminated." *Id.* at 8a,

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Pet. at 32-33) and (2) she was deprived of her constitutional right to a jury trial. *Id.* at 14-21, 39-40. Survival of a motion to dismiss does not, of course, grant plaintiff an absolute right to a jury trial in a copyright (or any other) action, and grant of a meritous, post-discovery summary judgment motion does not in any way "conflict" with those earlier findings. Petitioner's extensive reliance on *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340 (1998) is misplaced. *Feltner* resolved the issue of whether there was a right to jury trial when a copyright claimant seeks statutory damages. This Court's answer in the affirmative does not inform the issue on this Petition: *i.e.*, whether unrebutted documentary evidence demonstrating independent creation supports summary judgment.

n.3. Judge Wood concluded that "Even if this evidence were sufficient to establish that Plaintiff's work was widely disseminated, Defendants have produced volumes of evidence to establish that Defendants were not exposed to it." *Id.* The court examined that evidence and concluded that Maharam's speculative arguments in response failed to sustain her burden of establishing the existence of a material issue of fact. The court granted summary judgment, concluding that "even assuming, arguendo, that Defendants had access to Plaintiff's work, they have defeated her copyright infringement claim by producing substantial, uncontradicted evidence that the 'santaKid' works were created independent of her work." *Id.* at 13a-14a.

The Second Circuit affirmed summary judgment "for substantially the reasons stated by the district court in its thorough opinion." Second Circuit Order at 4a-5a. The Court of Appeals additionally noted that in contrast to the facts in *Repp v. Webber*, 132 F.3d 882, 889 (2d Cir. 1997) on which plaintiff had relied, Maharam's experts had specifically declined to opine that the two works were so strikingly similar as to preclude the possibility of independent creation, and defendants had provided extensive affidavits and documentary evidence establishing that *santaKid* was independently created without any knowledge of Maharam's work.[3] Second Circuit Order at 4a-5a.

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[3] The Second Circuit also found that Judge Wood did not abuse her discretion in denying Maharam's recusal motion. On several occasions in the course of the case below, Maharam questioned Judge Wood's impartiality. The record shows that

As set forth below, there is no disagreement among the appellate courts that compelling and unrebutted evidence of independent creation is relevant to – and may be grounds for – summary judgment of a copyright infringement claim. Further, on the facts of this case, in light of the fatally weak evidence of defendants' access to Maharam's work, the lack of substantial similarity between protectable elements of *"Kid" Santa Claus* and *santaKid*, and the overwhelming evidence of independent creation, summary judgment was proper here. Accordingly, this Petition for certiorari should be denied.

Judge Wood carefully weighed her arguments and found them meritless. Nonetheless, Maharam's Petition before this Court reiterates many of her complaints in a manner that threatens to confuse the issues here. *See, e.g.*, Pet. at 7 n.1, 36 n.6. Respondents emphasize that Maharam is NOT seeking certiorari on the recusal issue and her arguments are therefore irrelevant to the question presented.

Relatedly, Maharam complains that she was not afforded a proper hearing in the Second Circuit because Judge Rosemary Pooler "recused" herself and the appeal was heard only by a two-judge panel. Although scheduled to hear arguments that day, Judge Pooler was absent for the entire afternoon session and there is no evidence that she "recused" herself for this case. Second Circuit Order at 2a n.**.

ARGUMENT

I. THERE IS NO DISPUTE AMONG THE CIRCUITS THAT INDEPENDENT CREATION MAY BE GROUNDS FOR SUMMARY JUDGMENT IN A COPYRIGHT INFRINGEMENT CASE

It is black-letter law that independent creation is an absolute defense to a prima facie case of infringement. *See, e.g., Procter & Gamble Co. v. Colgate Palmolive Co.*, 199 F.3d 74, 77 (2d Cir. 1999) (assuming without finding that plaintiff had established a prima facie case of infringement yet affirming judgment for defendants on grounds of independent creation); *Grubb v. KMS Patriots L.L.*, 88 F.3d 1, 3 (1st Cir. 1996) ("Even if both showing [of access and substantial similarity] are made ... the trier of fact may nonetheless find no copying if the defendant shows independent creation."); *Fodor v. Time Warner, Inc.*, No. 92-56169, 92-56465, 1994 U.S. App. LEXIS 4250, at *4 (9th Cir. Mar. 2, 1994) ("Even if two works are substantially similar ... there is no infringement liability if the challenged work was independently created."), *cert denied*, 513 U.S. 869 (1994); *Benson v. Coca Cola Co.*, 795 F.2d 973, 975 (11th Cir. 1986) (en banc) ("testimony of [writers of allegedly infringing song] constitutes uncontradicted evidence of independent creation, fully negating any claim of infringement"); *CMM Cable Rep, Inc. v. Ocean Coast Properties, Inc.*, 97 F.3d 1504, 1525 (1st Cir. 1996) (affirming jury's verdict of non-infringement when "[i]n the alternative, the jury could also have reasonably found that access and substantial similarity aside,

[defendant's] brochure was, in fact, an independent creation").

Evidence of independent creation may also serve to negate a finding of striking similarity which may prove copying in the absence of evidence that defendants had a reasonable opportunity to encounter plaintiff's work. *Gaste v. Kaiserman*, 863 F.2d 1061, 1068 (2d Cir. 1988) ("A plaintiff has not proved striking similarity sufficient to sustain a finding of copying if the evidence as a whole does not preclude any reasonable possibility of independent creation."); *Repp*, 132 F.3d at 889 (to find two works strikingly similar they must be so identical as to preclude any possibility of independent creation); *Corwin II v. Walt Disney Company.*, 475 F.3d 1239, 1253-54 (11th Cir. 2007) (evidence of independent creation of EPCOT precludes finding of striking similarity; summary judgment affirmed).

Because independent creation is a mixed question of law and fact, courts do not grant summary judgment on that ground lightly. *See Glover v. Austin*, 289 Fed. Appx. 430, 433 (2d Cir. July 24, 2008) (referring to the Second Circuit's "usual reluctance to grant summary judgment based on the defendants' claim of independent creation"); *but see Langman Fabrics v. Graff Californiawear, Inc.*, 160 F.3d 106, 117 (2d Cir. 1998) (Jacobs, J. dissenting) ("The majority opinion (in my view) arrives at the wrong result, but it should not be read to raise the bar for granting summary judgment on the defense of independent creation."). Nonetheless, we have found no circuit, including the Second Circuit, that declines to affirm the grant of summary judgment

when the evidence of independent creation is so strong as to negate a prima facie case of copying. *See, e.g., Chivalry Film Prods. v. NBC Universal*, 05 Civ. 5627, 2006 U.S. Dist. LEXIS 92956, at *9 (S.D.N.Y. Dec. 22, 2006) (granting summary judgment on independent creation as a separate and independent ground), *aff'd*, 249 Fed. Appx. 856 (2d Cir. Oct. 4, 2007) (affirming the judgment of the district court for substantially the reasons set forth in the opinion and order); *Vargas v. Pfizer Inc.*, 352 Fed. Appx. 458, 460 (2d Cir. Nov. 5, 2009) (affirming summary judgment on copyright infringement because defendants offered ample and unrebutted evidence of independent creation to counter claim of striking similarity); *Burgin v. LaHaye*, No. 09-16066, 2010 U.S. App. LEXIS 20246, at * 6-7 (11th Cir. Oct. 1, 2010) (summary judgment affirmed even if plaintiff could show access and probative similarity because defendants negated claim of infringement with evidence of independent creation); *Grubb*, 88 F.3d at 4-5 (1st Cir.) (affirming summary judgment despite conflicting evidence on access because on undisputed evidence that defendants independently created logo); *Fodor*, 1994 U.S. App. LEXIS 4250, at *10 (9th Cir.) (affirming summary judgment on copyright infringement because plaintiff failed to "introduce[] facts which contradict the substantial evidence introduced by [defendants] to establish prior independent creation").

Indeed, Judge Wood's fellow judges in the Southern District of New York routinely grant summary judgment on grounds of independent creation. *Scholastic Inc. v. Speirs*, 28 F. Supp. 2d 862, 869 (S.D.N.Y. 1998) (no need to resolve the

weakness of plaintiff's substantial similarity argument when summary judgment merited because defendants presented "strong, convincing and persuasive evidence" of independent creation) (citation omitted), *aff'd*, 199 F.3d 1323 (2d Cir. 1999); *Chivalry Film Prods.*, 2006 U.S. Dist. LEXIS 92956, at *9; *Dimmie v. Carey*, 88 F. Supp. 2d 142, 150 (S.D.N.Y. 2000) (granting summary judgment on grounds that "[w]here as here, convincing proof of independent creation exists, prima facie copying (assuming it were established) may be rebutted); *Cox v. Abrams*, 93 Civ. 6899, 1997 U.S. Dist. LEXIS 6687, at * 19-22 (S.D.N.Y. May 14, 1997) (granting summary judgment on additional ground of unrebutted independent creation of defendants movie); *Tisi v. Patrick*, 97 F. Supp. 2d 539, 549 (S.D.N.Y. 2000) (granting summary judgment with respect to defendant's song because of unrebutted evidence that it was created independently); *Silberstein v. Fox Entertainment Group, Inc.*, 424 F. Supp. 2d 616, 628 (S.D.N.Y. 2004) (noting that "[e]vidence of independent creation is an established ground for granting summary judgment" and granting the motion on "copious" evidence of independent creation of cartoon character), *aff'd*, 242 Fed. Appx. 720 (2d Cir. June 14, 2007); *Novak v. National Broad. Co., Inc.*, 752 F. Supp. 164, 172-17 (S.D.N.Y. 1990) (granting summary judgment when evidence that defendants' skits were the independent creation of the skit's writers mooted any issue of material fact with respect to access); *Favia v. Lyons Partnership*, 1996 U.S. Dist LEXIS 5306, at *10-12 (S.D.N.Y. Apr. 23, 1996) (summary judgment when unrebutted evidence showed

independent creation of song), *aff'd*, 112 F.3d 503 (2d Cir. 1997).

The cases cited by Maharam for the proposition that "independent creation is a fact issue for a jury" and that summary judgment is never appropriate on evidence of independent creation are entirely inapposite. In neither *T-Peg, Inc. v. Vermont Timber Works, Inc.*, 459 F.3d 97 (1st Cir. 2006) nor *Jada Toys, Inc. v. Mattel, Inc.*, 518 F.3d 628 (9th Cir. 2008) (Pet. at 26-27) did defendants raise a defense of independent creation; on the contrary both the 1st and 9th Circuits have affirmed that summary judgment may be appropriate on evidence of independent creation. *See supra* at 11. While the Second Circuit in 1910, affirming Judge Learned Hand, did hold that independent creation was no defense to an infringement claim, Judge Hand later, as an appellate judge himself, repudiated the holding he called "contrary to the very foundation of copyright law" and confirmed the settled principle that "independent reproduction of a copyrighted ... work is not infringement." *Arnstein v. Edward B. Marks Music Corp.*, 82 F.2d 275 (2d Cir. 1936). Finally the Fifth Circuit in *Peel & Company, Inc. v. The Rug Market*, 238 F.3d 391 (5th Cir. 2001), as well as the district courts in Michigan and Washington State cited by Maharam, did not hold that independent creation may *never* be a ground for summary judgment, only that under the facts of those particular cases, a question of material fact remained that precluded judgment for the defendants.

Similarly, the Second Circuit has never held that independent creation is not a proper ground for summary judgment. In both *Repp* and *Langman Fabrics*, cited by Maharam, the Second Circuit reversed summary judgment because the evidence of independent creation in the record was flawed and contradicted by factual and/or expert evidence, not because it considered the defense per se inappropriate at the summary judgment phase. *See infra* at 20, 25. *See also Glover*, 289 Fed. Appx. at 433-434 (vacating summary judgment because confused evidence of independent creation was opposed by "a strong showing of probative similarity" and a prima facie case of access).

Because there is no dispute among the Circuits that evidence of independent creation may rebut a prima facie case of copyright infringement, even at the summary judgment stage, there is no conflict for this Court to resolve.

II. THE DISTRICT COURT CORRECTLY CONCLUDED THAT SUMMARY JUDGMENT FOR DEFENDANTS WAS APPROPRIATE IN THIS CASE

The record shows that summary judgment was correctly granted in this case.

A. Respondents Presented Overwhelming Evidence of Independent Creation

The record shows that defendants submitted overwhelming and convincing evidence of defendants' detailed development of *santaKid* from its first draft to publication, indeed to a degree

rarely possible in copyright cases. These contemporaneous drafts, e-mails, editorial letters and the like – alone sufficient to satisfy defendants' burden – were nonetheless supplemented by the affidavits and sworn testimony of those individuals who were uniquely situated to be able to testify to that creation, including the author himself, his personal assistant, his former literary agent, the book's editor, and the illustrator. Although Maharam attempts to discredit each of these witnesses as biased, it is hard to imagine any assertion of independent creation in a literary copyright case which would not draw on a comparable group of individuals. Moreover, the primary purpose of their testimony was to present, explain and support the unrebutted documentary record.

The creation and evolution of *santaKid* is documented by no less than eleven working drafts of the story. SA-749-1336. The first, a 41 page, handwritten text (memorialized in a typed version of the manuscript marked "version 1" and dated April '03) includes many of the thematic elements, the story arc, and inventive details of character and plot that appear in the final work. SA-764-846. These include the themes of the commercialization of Christmas and the transformative power of imaginative belief, the story arc of the purchase of the North Pole by Exmas Express and the key role of Santa's child in rescuing Christmas from the disaster wrought by adult interference. It includes many details of character and plot that distinguish Patterson's book from Maharam's, such as the fact that Santa is an every-day father who grows his

beard and pads his suit to look the part at Christmas, and Exmas Express's tacky toys. There are multiple indicia of original creation, such as crossed-out and inserted text, place holders for some of the subsidiary characters' names, and whole scenes (such as a digression at boarding school) which were eventually expunged from the book. *See, e.g.*, SA-792-93, 824, 831-32. Most significantly, in contrast to Maharam's works, the original idea for the protagonist in *santaKid* is a boy, Patterson's own son Jack.

Nine further drafts fully document the changes to the story that led to the finished book, from a version 2 dated May 03, through highly marked-up versions from Patterson's editor, to a final line-edited version dated August 7, 2003. SA-847-1336. These drafts and their accompanying detailed cover letters evidence major plot changes as well as many refinements of theme, character and language: for example a letter dated June 16, 2003 from Andrea Spooner (the book's editor) to Patterson recommends omitting the boarding school scene as a distraction and the attached mark up also deletes the original "dream revelation" ending. SA-1125-27. A later mark up suggests dropping the grandparents as subsidiary characters. SA-1137.

The resulting evolution of *santaKid*, along with the editorial commentary, belie any knowledge of Maharam's works. Thus, for example, Patterson's editor notes the originality of the idea of Santa having a child: "I honestly think it's the first time I've seen a story told from the point of view of Santa's own progeny." SA-1123. Similarly, the

drafts document the evolution of the protagonist from a boy, Jack, to a girl, Chrissie.[4] Logically, if copying was actually occurring, one would not revise the Work to make it *more* similar to plaintiff's. *See, e.g.*, *Silberstein*, 424 F. Supp. 2d at 628-629 (noting that evidence of creation of defendants' "Scrat" character independently from plaintiff's "Sqrat" character includes the documented development of the name late in defendants' design process).

This extensive documentary evidence of the creation of *santaKid* is buttressed by the affidavits and deposition testimony of Patterson and Garland, the illustrator, as well as affidavits and/or deposition testimony from Patterson's former personal assistant, his *santaKid* editor and his longstanding editor, his agent, and the Vice President of Publicity and Communications at Saks. A-149-50; SA-546-47, 647-763, 2047-2283. Their sworn testimony presents a full picture from the 2002 initial inspiration for the story in Patterson's own son, through the primary refinements of the plot and characters, through Patterson's working methods, to the final publication of the book and the later design of Saks windows.

B. Maharam Offered Mere Speculation in Rebuttal

Maharam offered no evidence to rebut this extensive record of independent creation. Instead,

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[4] And the fact that the protagonist was originally a boy is also confirmed in contemporaneous correspondence from Patterson's former assistant, the then-CEO of Time Warner Books, and even a painting commissioned by Patterson. SA-886-89.

she relied on completely unfounded and speculative allegations of conspiracy and falsification of evidence to assert that independent creation is "a sham." The district court outlined those allegations in its opinion and correctly characterized them as "generalized, speculative arguments" that failed to rebut defendants' showing of independent creation. Summary Judgment Decision at 12a-13a. *See Delaware & Hudson Ry. Co. v. Consolidated Rail Corp.*, 902 F.2d 174, 178 (2d Cir. 1990) ("Conclusory allegations will not suffice to create a genuine issue."); *Jorgensen v. Epic/Sony Records*, 351 F.3d 46, 51 (2d Cir. 2003) (to avoid summary judgment plaintiff "may not rely simply on conclusory allegations or speculation ... but instead must offer evidence to show that [her] version of the events is not wholly fanciful) (quoting *Morris v. Lindau*, 196 F.3d 102, 109 (2d Cir. 1999); *Vargas*, 352 Fed. Appx. at 460 (plaintiff's affidavit in opposition incorporating "mere assertions, and equivocal ones at that are insufficient to satisfy their burden" of rebutting evidence of independent creation on summary judgment).

In her Petition, as in her papers below, Maharam grasps at witnesses' occasional lapses of memory over insignificant details as evidence of deception rather than authenticity (Pet. at 30, 35). She incorrectly claims that Judge Wood "seemed particularly troubled that there were no eyewitnesses to Patterson's alleged independent creation of his alleged suspect drafts," ignoring the fact that there are surely few examples of literary creation when such witnesses do exist. Pet. at 35. As in the case below, she obsessively focuses on

Patterson's occasional practice of using ghost writers for first drafts of other novels, *id.* at 36, 37 & n.7, when the unrebutted evidence shows no such reliance in the case of *santaKid*. SA-753-54, 1054-71. And she misreads the evidence on the scope and timing of Tanzman's involvement in the Saks display (Pet. at 7, 30 n.5), while ignoring the undisputed fact that *santaKid* was conceived and written by Patterson long before Saks agreed to feature the book in its seasonal windows and long before the store hired Tanzman.[5] A-139-48; SA-1636-38, 1647, 2175-76. Thus, the incidences of conflicting evidence she cited to the district court and on appeal are either not material by any standard or are strained misreadings of the evidence.

None of her conspiracy theories have any factual basis. After extensive discovery (during which Maharam was represented by counsel), she had absolutely nothing to rebut the overwhelming evidence that defendants created *santaKid* completely independently, and without any reference to Maharam's works.

Maharam's primary legal arguments in her Petition are that in granting summary judgment, the court erred in finding independent creation by relying on the testimony of witnesses who were not disinterested and that the court improperly weighed

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[5] Maharam does not explain why she considers Tanzman's deposition and declaration "suspect," and the allegation that "she mirrored my press materials to feed to James Patterson for his media campaign" has no support in the record. Pet. at 30 n.5.

questions of fact. According to Maharam, Patterson's former literary agent, his secretary and his editor all stand to gain from Patterson's success and therefore their testimony – as well as the documents that originate from them or bear their comments – may not be considered on independent creation under *Repp*, 132 F.3d 882, and its progeny. But as the Second Circuit stressed, Maharam misconstrues *Repp*, both in the facts before the court and its legal holding and, contrary to Maharam's assertions, the district court did not improperly "weigh" the evidence on independent creation – plaintiff proffered no evidence for it to weigh.

1. Court Relied On Both Witness Testimony *and* Extensive Documentary Evidence

First, it is clear from the district court's decision that, in contrast to *Repp*, the court below based its finding of independent creation on the *combination* of witness testimony and the extensive documentary evidence before it. In *Repp*, the Second Circuit criticized the district court's exclusive reliance on the testimony of Andrew Lloyd Webber and Sarah Brightman for independent creation who together asserted that Webber composed the song at the piano for Brightman in her presence. Because this testimony was unsupported by any documentary evidence (the two were improvising alone in their home) and was directly contradicted by expert testimony that the two pieces of music were so "strikingly similar ... as to preclude the possibility of independent creation," an issue of material fact remained and the court reversed the grant of

summary judgment. *Repp*, 132 F.3d at 890. Some courts in other circuits have also questioned whether summary judgment is appropriate on independent creation when the *only* evidence offered in support is the testimony of interested parties. *See e.g.*, *Wrench LLC v. Taco Bell Corp.*, 256 F.3d 446, 459-60 (6th Cir. 2001) (material issue exists when only evidence was testimony from defendant's interested witnesses); *Overman v. Loesser*, 205 F.2d 521 (9th Cir. 1953). *But see Burgin*, 2010 U.S. App. LEXIS 20246, at * 6-7 (independent creation shown when defendants testified in detail on their collaborative process in creating their works and plaintiff failed to offer evidence to refute it); *Grubb*, 88 F.3d at 4 ("[o]n summary judgment, absent specific facts discrediting testimony from a witness associated with the movant, and absent a direct conflict in the testimony, the opponent (although entitled to have his or her evidence taken as true) is not entitled to have the defendant's evidence positively disbelieved.")

Here in contrast, the testimony of defendants and their witnesses[6] was secondary to the clear

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[6] It is far from clear that many of these witnesses, as non-parties, are indeed "interested" in the sense that Webber and Brightman were in *Repp*. Indeed both the appellate and the district court considered them disinterested witnesses. *See* Second Circuit Order at 5a; Summary Judgment Decision at 11a. Unlike interested witnesses in comparable cases, these individuals were not parties, nor did they stand to gain financially from the outcome of this suit. Petitioner repeatedly presses as error the Second Circuit's passing reference to "affidavits" from "the Decision turning on two affidavits that don't exist." Pet. at 2. However, Patterson's former agent and secretary provided affidavits (Pet. at 22 n.3) in the sense that

documentary record on independent creation in the voluminous story drafts (evidencing each iteration of the story's evolution), annotations, emails, and correspondence. Second Circuit Order at 5a. ("ample documentary evidence ... corroborating the affidavits"); Summary Judgment Decision at 10a ("vast amount of evidence"). As just one example, the key fact that Patterson first conceived of the protagonist as a boy based on his son Jack – which logically argues against copying of *"Kid" Santa Claus* – is supported not only by the testimony of Patterson and his former agent, but by documentary evidence: the first drafts of the story (including the first, handwritten version) (SA-764-846); by Mr. Patterson's correspondence from May and June 2003 with his personal assistant, Mary Jordan, and the CEO of Time Warner Book Group (SA-886: May 5, 2003 letter from Ms. Jordan, noting "I thought it was awesome that Santa taught Jack that Christmas was all about spirit and holiness and magic."; SA-887-88: June 18, 2003 e-mail from Laurence Kirshbaum); and even by a painting created for Patterson depicting the protagonist as a little boy (SA-889).

Further, while *Repp* stands for the proposition that testimony from interested parties *alone* may not provide the basis for a successful defense of independent creation, case after case establishes that testimony supported by contemporaneous documentary evidence is more than sufficient to

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they both gave sworn testimony at deposition which was in the record available to the Second Circuit panel.

establish independent creation and to dismiss an action on summary judgment. Courts routinely find independent creation based on the drafts, outlines, mark-ups, session tapes, models, sketches and emails created by the author or a close associate, who are not necessarily disinterested parties; indeed such evidence is the mother lode of independent creation. *See Scholastic*, 28 F. Supp. 2d at 869 (granting defendants' motion for summary judgment where there was "strong, convincing and persuasive" evidence of independent creation; defendants offered "uncontradicted evidence – presented in the form of affidavits [from the illustrator and two employees of Scholastic], as well as a paper trial of contemporaneous memos and sketches – relating to the development of the allegedly infringing [works]."") (citations and internal quotation marks omitted), *aff'd*, 199 F.3d 1323; *Novak*, 752 F. Supp. at 170-71 (granting summary judgment on the independent ground of independent creation based on the affidavit of a former colleague of defendant skit writer and a tape, press releases and reviews of a precursor to the allegedly infringing skit); *Rodriguez v. Heidi Klum Co., LLC*, 05 Civ. 10218, 2008 U.S. Dist. LEXIS 80805, at *20-22 (S.D.N.Y. Sept. 30, 2008) (independent creation shown by testimony of creators of reality TV show, contemporaneous emails and draft outlines authored by them).

It is precisely the development of a work from its first steps to finished product that evidences the creative process and gives the lie to accusations of copying and conspiracy, especially where, as here, certain elements of the work bring the finished

product **closer** to the allegedly infringed work. *Scholastic*, 28 F. Supp. 2d at 869; *Silberstein*, 424 F. Supp. 2d at 628-29 ("While it is theoretically not impossible that an individual involved with *Ice Age* was exposed to Silberstein's Sqrat logo prior to the creation of Scrat, the uncontradicted evidence demonstrates that the conception of this character and its role in the film evolved and developed in an incremental fashion that does not bear any indicia of having been shaped by plaintiff's Sqrat or indeed by any other preexisting creative work.").

2. In Contrast to *Repp*, Maharam Offered No Convincing Expert Evidence on Striking Similarity.

Moreover as the Second Circuit noted, in contrast to the convincing expert testimony in *Repp* on striking similarity which undercut weak testimonial evidence of independent creation, here there was no evidence before the court of significant similarities probative of copying. Second Circuit Order at 4a. Indeed, once Maharam's literary expert acknowledged the countless pre-existing works that contained similar protagonists and story lines to the works at issue and also admitted that he could not preclude independent creation, Maharam had to withdraw her argument that the works were "strikingly similar" so as to infer access. SA-2301-33, 2352, 1668-69 (letter from Maharam's attorney to the court stating that "there is not sufficient evidence of striking similarity to require submission

to the jury.").[7] Further, in granting summary judgment, the court referenced its earlier finding on a motion to dismiss that substantial similarity was a "close" case and based its conclusion only on "**assum[ing], arguendo**" that plaintiff had made a prima facie case of copying. Summary Judgment Decision at 7a-8a (emphasis added).

Indeed, when independent creation as a basis for summary judgment has been found wanting, it is only when the evidence supporting independent creation is relatively weak, while the evidence supporting substantial similarity (or even striking similarity to infer access) is strong. *See, e.g., Glover*, 289 Fed. Appx. at 431, 433 (vacating grant of summary judgment on copyright infringement of a song when plaintiffs adduced "significant evidence of similarities" probative of copying and the testimony of defendants or one of their employees on independent creation was supported only by confusing and contradictory evidence about the sound recordings); *Langman Fabrics*, 160 F.3d at 115-16 (same when only evidence of independent creation were the affidavits of the president of defendant company and certain business associates and there was a complete lack of documentary evidence to show when the allegedly infringing fabric

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[7] Maharam's expert on illustrations withdrew after his deposition. SA-1685. It is simply not true, as Maharam asserts in her Petition, that her experts "stand by their reports" on the issue of striking similarity and independent creation (Pet. at 22 n.3), and the district court's conclusion that the "visual impact of the books is strikingly different" (SA-579) was not challenged on appeal.

was created and when it came into defendants' possession). Here, of course, Maharam had to withdraw any argument of "striking similarity," the court below found substantial similarity a "close" call, and independent creation is supported by unambiguous documentary evidence.

C. Expert Testimony and Other Evidence that the Similarities Between the Works Were Non-Protectible Supports Independent Creation

Independent creation was further supported by expert testimony and other evidence before the court demonstrating that virtually all of the alleged similarities between the works were in fact unprotectable themes or scenes a faire, staples of the genre. *Procter & Gamble*, 199 F.3d at 78 (when creative elements in plaintiff's and defendant's works are commonly found in the public domain, inference is that commonality is due to independent creation, not copying).

Defendants' expert, Professor John Cech, submitted a comprehensive report, drawing from a wealth of previously published children's books, which established that the elements relied on by the district court in finding a "close call" on substantial similarity – such as "fun-loving girls who confidently take on the challenge" and who speak in modern vernacular – are so common in today's children's literature as to be banal. SA-1696-1723, 1711. *See also* SA-660-61. Likewise, the plot, structure and sequence of events – when abstracted to the level that any comparison can be made – can also be found

in innumerable works – even other children's stories involving daughters of Santa Claus. SA-1702-06.

Discovery revealed that there are hundreds of stories about people and animals saving Christmas while Santa faces obstacles, including other works in which Santa's child or other plucky girls deliver the Christmas presents in Santa's sleigh, invariably involving traveling from town to town. *See* SA-1696-1723; SA-660-61, 1688-95. There is absolutely nothing unusual or unique in appellant's well worn concept of a coming-of-age story in which a child steps into her parent's shoes and nothing surprising in Maharam's coupling of this common storyline with the endlessly mined scenario of someone needing to save Santa and deliver the presents. Indeed, the record contains evidence of over 60 books, videos or other works actually featuring the title "X Saves Christmas" or "X Saved Christmas." SA-1693, 1866-68.

In sum, given how common the supposedly similar elements are and how compelling the evidence of independent creation is, this record conclusively establishes that *santaKid* was independently created without any reference to Maharam's *"Kid" Santa Claus* works.

D. A Weak Showing of Access and Substantial Similarity Supports Summary Judgment

Finally, the court's grant of summary judgment on the grounds that defendants presented overwhelming and unrebutted evidence of independent creation is further supported by

Maharam's failure to raise an issue of fact that defendants had a reasonable opportunity to view her works or that the works are substantially similar.

1. The Record Fails to Show That Appellants Had a Reasonable Opportunity to View *"Kid" Santa Claus*

Maharam alleged many theories of access before the court below but the only one that she pursued with any vigor is that her *"Kid" Santa Claus* works were widely disseminated. Thus, the district court did not even address access through a direct chain of events or personal contact.[8] But as the district court suggested and as a review of the record confirms, Maharam failed to present sufficient evidence to raise a question of fact as to whether her works were so widely disseminated that access could be

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[8] Maharam attempts in her Petition to revive her theory, briefly asserted before the district court, that defendants had access to her *"Kid" Santa Claus* works through a chain of intermediaries.. Pet. at 37 n.7. Appellant did not contend that she submitted her works to Patterson, Garland, or anyone else directly involved in the creation of *santaKid*. SA-1988-89. Despite extensive discovery, Maharam was unable to point to any nexus between Tanzman and any of the defendants prior to October 18, 2004 when Tanzman began her employment with Saks and *santaKid* "had already been created and the contract with Saks Fifth Avenue, providing for the window displays, had been concluded." SA-607. Moreover, Tanzman testified that she never discussed plaintiff or her works with any of defendants. A-140; SA-2171. Finally, the so-called affidavit from her mother, cited at page 37, note 7 of the Petition, was rightly rejected by Judge Wood as grossly untimely and is therefore not in the record.

reasonably inferred. Summary Judgment Decision at 8a n.3.[9]

In sum, as the district court recognized, notwithstanding the extensive fluidity of Maharam's shifting theories of access, she failed to advance any "significant, affirmative and probative evidence" to meet her burden. *Jorgensen*, 351 F.3d at 51, quoting

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[9] To try and overcome her lack of evidence supporting a finding of widespread dissemination, Maharam attempted to premise her theory of dissemination on an improper aggregation of the distribution of all the forms of her *"Kid" Santa Claus* works, from the Songs that lacked most of the plot and character elements forming the basis for her substantial similarity claims, to an unpublished storybook (*see* SA-1931, 1975-76, 1981, 1929-30, 1986), to a musical that was performed on a handful of occasions. *See, e.g.*, SA-1957-58, 2009, 2044-45. Access requires a reasonable "opportunity to copy" and mere speculation or conjecture is not sufficient. *Murray Hill Publ'ns, Inc. v. Twentieth century-Fox Film Corp.*, 361 F.3d 312, 316 (6th Cir. 2004), *cert denied*, 543 U.S. 959 (2004). No single Maharam work contains all the protectible elements of plot, settings, character or total concept and feel that she alleged defendants copied. And even cobbling together all her disparate works, she failed to support a finding of widespread dissemination beyond an "attenuated argument." Indeed, even if the distribution of her songs were relevant, that distribution decades prior to the creation of *santaKid* falls drastically short of the persuasive level required to impute access. *See, e.g.*, *Rice v. Fox Broadcasting Co.*, 330 F.3d 1170, 1178 (9th Cir. 2003) (plaintiff's work "only sold approximately 17,000 copies between 1986 and 1999; therefore, the video cannot be considered widely disseminated"); *Jewel Music Publ'g Co. v. Leo Feist, Inc.*, 62 F. Supp. 596, 598 (S.D.N.Y. 1945) (finding no access to plaintiff's song despite the fact that 4,000 copies were distributed to various broadcasting stations and artists, and 5,626 copies, 168 orchestrations and 198 band arrangements were sold).

Scott v. Paramount Pictures Corp., 449 F. Supp. 518, 520 (D.D.C. 1978), *aff'd* 607 F.2d 494 (D.C. Cir. 1979). [10]

2. Maharam Failed to Make Even a Prima Facie Case of Substantial Similarity

In examining the substantial similarity of two works, courts look only to the protectible original elements of the copyrighted work. *Harper & Row, Publrs. v. Nation Enters.*, 471 U.S. 539, 548 (1985); *Williams v. Crichton*, 84 F.3d 581, 588 (2d Cir. 1996) ("we must take care to inquire only whether 'the *protectible elements, standing alone*, are substantially similar'") (quoting *Knitwaves, Inc. v. Lollytogs Ltd.*, 71 F.3d 996, 1002 (2d Cir. 1995)). It is black letter law that copyright protection does not extend to generalized ideas, themes, or scenes a faire. *Feist Pubs., Inc. v. Rural Tel. Svc. Co., Inc.*, 499 U.S. 340, 347 (1991); *Campbell v. Acuff-Rose Music*, 510 U.S. 569, 576 n.5 (1994). Rather, plaintiff must show "similarities of treatment, details, scenes, events and characterization." *Reyher v. Children's Television Workshop*, 533 F.2d 87, 90-91 (2d Cir. 1976).

A simple comparison of *"Kid" Santa Claus* and *santaKid*, even putting aside the issue of access and

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[10] Patterson, Garland, Spooner and Pietsch all testified that they never heard of Maharam or saw or heard her works before the commencement of the lawsuit. SA-758-61, 667, 661-63, 648-49, 2070, 2222, 2145. *See also* SA-2238, 2245, 2247-48. In addition to these denials, they have denied attending the events, appearing at the locations, or listening to the radio stations where Maharam claims to have distributed her works.

taking Maharam's works in the aggregate, shows that they are not substantially similar in total concept, feel, mood or narrative voice. "Total concept and feel" is especially important in children's works because they are often less complex. *Id.* at 91-92. Maharam's story is told with upbeat, breathless enthusiasm, incorporating burlesque and Hollywood-style touches (especially in the musical), whereas *santaKid* explores greater contrasts of mood, from the early joyful life at the North Pole, to the harsh realities of Warrie Ransom's exploitation of Christmas and his grotesque toys, ending with the spiritual awakening of Chrissie. Maharam's storybooks are narrated in the third person in an awkward rhyming verse, while *santaKid* is told in first-person prose.

With respect to setting and character, most of the similarities between the works are common, unprotectible ideas or the equally unprotectible settings and character traits that inevitably flow from them. Snow-capped houses, sacks of gifts, sleighs, reindeer, elves and other Christmas elements are generic and not protectible. To the extent that the protagonists speak in a modern, child-like vernacular, such language is ubiquitous and necessarily flows from the idea of creating a children's storybook. SA-2330; SA-2014. That they are happy, fun-loving, confident, independent, and brave are common traits that arise from the idea of a young heroine in the face of adult opposition or failure. *See, e.g., Corbo v. Patterson*, No. CV05-2374, slip op. at 11 (C.D. Cal. Aug. 11, 2005) (SA-1680) ("[T]he idea of Santa having a child is not protectible. Nor is the idea of Santa having a young,

eager, kind-hearted, sleigh-driving child."); *Cavalier v. Random House, Inc.*, 297 F.3d 815, 828 (9th Cir. 2002) ("The themes of teaching children to have confidence, to overcome their fears, and to try are not only too general to be protected but are also standard topics in children's literature."). Moreover, in many respects the protagonists are remarkably different, given the restrictions of the genre. They look different and dress completely differently. Holly Nicole is "the red-headed rebel," an action-driven character, lacking in self-reflection, for whom her Christmas ride is as much an opportunity to dress up and preen as it is a spiritual or emotional quest. SA-95. Chrissie is a far more serious, even spiritual child, who is forced to grow up quickly when faced with the her father's depression and Warren Ransom's perfidy.[11]

Finally, the plot, structure and sequence of events, are either ubiquitous to the genre and are unprotectible ideas and scenes a faires, or they are expressed in very dissimilar ways. On a generalized level, both stories are about the unprotectible idea of Santa's daughter stepping up in a crisis to deliver the presents at Christmas. *See Denker v. Uhry*, 820 F. Supp. 722, 732 (S.D.N.Y. 1992) (common plot device of an "accident" to open a book cannot form the basis for infringement), *aff'd*, 996 F.2d 301 (2d Cir. 1993). Any such story is likely to include a description of the journey, riding a sleigh, reindeers,

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[11] The supporting characters in each story either have no counterparts (such as Holly's brother and the robot Iglue) or, if they do appear in common (like Santa or Mrs. Claus) they look and act in completely different ways.

stopping at houses to deliver the presents, and a happy denouement. *Williams*, 84 F.3d at 587 ("*scenes a faire*, sequences of events that 'necessarily result from the choice of a setting or situation,' do not enjoy copyright protection") (quoting *Walker v. Time Life Films, Inc.*, 784 F.2d 44, 50 (2d Cir. 1986)).

But within those constraints, the stories here are remarkably unlike each other. Maharam's story launches quickly into Holly's preparation for her journey and the bulk of her narrative, developed most fully in the Expanded Storybook, follows her travels by sleigh around the world, visiting cities, getting lost, and finally picking up her father in LA to finish her task. The sleigh journey in *santaKid*, by contrast, does not occur until late in the story, after the key and entirely distinguishable plot elements of the arrival of Exmas Express, the purchase of the North Pole, Santa's decline into despair, the manufacture of faulty toys, the failure of the delivery process in the snow, and Chrissie's unsuccessful appeal to Ransom. The commercialization of Christmas is the impetus for Chrissie's physical journey and her spiritual awakening. Her belief in something "bigger than herself" is what fuels the sleigh, what transforms her character, and what persuades Ransom to withdraw from the North Pole. In contrast, Maharam's Expanded Storybook ends with Holly's playful cry "And Christmases are going to be ever more fun from now on!" (SA-103) whereas *santaKid* ends with a touching reaffirmation of the spiritual nature of Christmas (SA-296).

In short, far from being a "close one," a review of the works themselves – particularly in the context of the full record documenting how common each of the alleged similarities is in children's literature (SA-1688-95) – makes clear that Patterson's *santaKid* is far from substantially similar in protectible expression to Maharam's *"Kid" Santa Claus*, whether in its individual manifestations or in the aggregate, much less strikingly similar.

CONCLUSION

There is no conflict among the Circuits as to whether independent creation may provide grounds for summary judgment. Further, in light of plaintiff's weak showing of access, a lack of substantial similarity between the two works and extensive and unrebutted evidence of independent creation, the case below was correctly decided. Respondents therefore respectfully submit that the Petition for a Writ of Certiorari should be denied.

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